



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

February 19, 2003

Ms. Carol Longoria  
Public Information Coordinator  
University of Texas System  
201 West 7<sup>th</sup> Street  
Austin, Texas 78701-2981

OR2003-1111

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175895.

The University of Texas at Austin (the "university") received a request for the following:

All information concerning the names of chemical and biological agents at the University of Texas at Austin and J.J. Pickle Research campus that were required by federal law to be registered with the Centers for Disease Control and Prevention by September 10, 2002.

You claim that the requested records are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert that the requested records are protected from disclosure under section 552.101 in conjunction with federal law. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Pursuant to section 351A of title 42 of the United States Code, all persons possessing deadly biological agents and toxins are required to register with the Secretary of Health and Human Services for the purpose of creating and maintaining a national database of such agents. 42 U.S.C. § 351A (West 2002). You state that, in accordance with this provision, you have provided the Centers for Disease Control (the "CDC") with a list of the select agents maintained by the university. You assert that pursuant to section 351A(h), the information at issue, which is a copy of the university's submission to the CDC, is confidential.

Section 351A(h)(1) specifically states:

No federal agency specified in paragraph (2) shall disclose under section 552 title 5, United States Code, [...] [a]ny registration or transfer documentation submitted under subsections (b) and (c) for the possession, use, or transfer of a listed agent or toxin; or information derived therefrom to the extent that it identifies the listed agent or toxin possessed, used, or transferred by a specific registered person or discloses the identity or location of a specific registered person.

*Id.* § 351A(h)(1) (West 2002). We note that, by its terms, section 351A(h)(1) only applies to certain federal agencies identified in section 351A(h)(2). *See id.* § 351A(h)(2) (defining federal agencies for purposes of 42 U.S.C. § 351A(h)(1)). Pursuant to section 552.303(c) of the Texas Government Code, the Office of the Attorney General (the “OAG”) notified you via facsimile dated January 3, 2003, that the OAG needed additional information in order to render its decision. Specifically, you were asked to explain how the university and the J.J. Pickle Research campus, which is part of The University of Texas System, are “federal agencies” as specified in section 351A(h)(2). In your correspondence of January 10, 2003 you acknowledge that neither the university nor the Pickle campus is a federal agency as defined by that provision. Instead, you argue that the release of the documents would be contrary to Congress’ intent to withhold such information from the public. In support of your argument, you have submitted portions of the congressional debates surrounding the passage of these provisions. We note, however, that statutory confidentiality requires express language that information is confidential. Moreover, confidentiality will not be implied from a statutory structure. *See* Open Records Decision Nos. 658 (1998), 478 (1987). Thus, the Office of the Attorney General cannot unilaterally create a confidentiality provision where one does not exist. Furthermore, in light of Congress’ evident preference for limiting the scope of non-disclosure, we are unwilling to assume that Congress meant more than it said in enacting section 351A(h)(1). *See Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986) (stating that in developing plain language rule, Court recognizes reality of legislative process and concludes that only rarely will outside evidence of broad purposes underlying enactment of legislation be useful); *see also Kofa v INS*, 60 F.3d 1084 (4<sup>th</sup> Cir. 1995) (stating that statutory construction must begin with language of statute; to do otherwise would assume that Congress does not express its intent in words of statutes, but only by way of legislative history); *see generally Coast Alliance v. Babbitt*, 6 F. Supp. 2d 29 (D.D.C. 1998) (stating that if, in following Congress’ plain language in statute, agency cannot carry out Congress’ intent, remedy is not to distort or ignore Congress’ words, but rather to ask Congress to address problem). Since, as the university concedes, section 351A(h)(1) does not apply to the university and you have not cited another federal or state provision or judicial decision that would make the records at issue confidential, we conclude that the documents are not excepted from disclosure under section 552.101.

You also assert that the requested records are excepted from disclosure under section 552.108. Section 552.108, the “law enforcement exception,” provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2), (b)(1)-(2). We note, however, that section 552.108 only applies to records of a law enforcement agency or prosecutor. *See* Open Records Decision Nos. 439 (1988) (concluding that Gov't Code § 552.108 only applies to records created by agency, or portion of agency, whose primary function is to investigate crimes and enforce criminal laws), 287 (1981). The university is not a law enforcement agency. Furthermore, while you generally assert that the requested records may be useful as a law enforcement tool, you have not indicated that any local, state, or federal law enforcement entity has asked that the university withhold this information so as not to interfere with an active criminal investigation. *See, e.g.*, Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under Gov't Code § 552.108); Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, Gov't Code § 552.108 may be invoked by any proper custodian of information which relates to incident). Thus, you have not demonstrated the applicability of section 552.108. We, therefore, conclude that the requested records must be released. Although we are not unmindful of the concern this ruling may cause, this office's chief duty is to apply governing law impartially to the facts and circumstances presented.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.*

§ 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

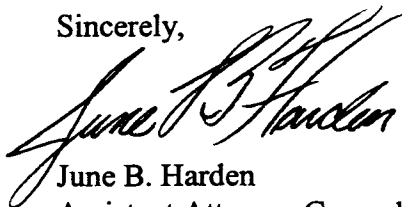
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "June B. Harden", is written over a horizontal line.

June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/seg

Ref: ID# 175895

Enc: Submitted documents

c: Mr. Jonathan York  
The Daily Texan  
P.O. Box D  
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(w/o enclosures)